BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, No. 03-14

Case No.: SC 04-1

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The Judicial Qualifications Commission exists to maintain public confidence in the integrity of our judiciary. To accomplish this important task, the Commission must recommend this Court remove an unfit judicial officer.

Clear and convincing evidence established that Judge James E. Henson ("Respondent") engaged in conduct fundamentally inconsistent with his remaining judicial office. The Hearing Panel for the Judicial Qualifications Commission found Respondent "presently unfit to hold the office of judge and therefore the Panel recommend[ed] to this [C]ourt that [Respondent] be found guilty and removed from office." (Findings, Conclusions and Recommendations by the Hearing Panel of the Judicial Qualifications Commission ("Findings"), p. 26).

This Court should accept the Hearing Panel's recommendation and remove Respondent from judicial office.

Respondent admitted he knowingly violated the Code of Judicial Conduct by accepting a $15,000 legal fee while he was a county judge. The Hearing Panel also found clear and convincing evidence that Respondent, while a lawyer, advised Diana Jimenez to flee to Colombia to avoid DUI manslaughter charges. Dr. Alberto Jimenez, Diana Jimenez's father,

testified that Respondent advised him that Ms. Jimenez should flee to Colombia to avoid criminal prosecution. Ms. Jimenez testified that Respondent on multiple occasions suggested to her that fleeing to Colombia was an alternative to substantial prison time. Robert Nesmith, an attorney who shared office space with Respondent, also testified that Respondent told Nesmith that Respondent told Dr. Jimenez that Ms. Jimenez should flee. "The [Hearing] Panel is charged with the responsibility of resolving the conflicts in evidence" and "[accepted] the testimony of [Ms.] Jimenez, Dr. Alberto Jimenez and Mr. Robert Nesmith and [found] this testimony to be clear and convincing." (Findings, p. 19). The totality of the evidence from these witnesses clearly and convincingly proved Respondent's misconduct. See In re Davey, 645 So.2d 398, 404 (Fla. 1994) (Court is to evaluate the "sum total of the evidence" in reaching its findings).

As concluded by the Hearing Panel, Respondent's misconduct warrants his removal from judicial office. The Hearing Panel reached this recommendation after making detailed, considered, and balanced findings, including findings that three of the charges against Respondent were not supported by clear and convincing evidence. This Court has ordered the removal of judges for lesser misconduct. A judge who admitted knowingly violating the Code of Judicial Conduct for $15,000 and who advised a client

to violate the law to avoid criminal prosecution is simply not fit to be a judge. The public would necessarily lose confidence in the judiciary if Respondent remains in office.

Argument

Article V, Section 12 of the Constitution of the State of Florida vests the Florida Judicial Qualifications Commission with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct "demonstrates a present unfitness to hold office." This Court has held that a judge is presently unfit to hold office if "the judge's conduct is fundamentally inconsistent with the responsibilities of judicial office." In re Graziano, 696 So.2d 744, 753 (Fla. 1997). This Court explained the interests of the JQC when investigating a judge:

> The Judicial Qualifications Commission, speaking for itself, the bench, the bar, and the public are understandably and properly concerned about any conduct which may affect the confidence of the people in the court or of any of its members. It understandably expects a higher standard of conduct from the judges of this state than of anyone else connected with the judicial system.
>
> In re Dekle, 308 So.2d 5, 11 (Fla. 1975), *superseded on other grounds*, In re J.Q.C. No. 77-16, 357 So.2d 172 (Fla. 1978).

The Hearing Panel of the JQC, chaired by Judge James R. Wolf, found clear and convincing evidence that Respondent committed actions "inconsistent with the responsibilities of a judicial officer and that Judge Henson is unfit to hold judicial office." (Findings, pp. 11, 26). Particularly, the Hearing Panel found Respondent practiced law while a judge and while a lawyer advised a client to flee the jurisdiction to avoid criminal prosecution. (Findings, pp. 3, 4). The Hearing Panel further found that Respondent's violations of the Code of Judicial Conduct and Rules of Professional Conduct "will impair the confidence of the citizens of this state in the integrity of the judicial system and that these violations constitute conduct unbecoming a member of the judiciary." (Findings, p. 26). Accordingly, the Hearing Panel appropriately recommended this Court remove Respondent from judicial office. (Findings, p. 26).

The Hearing Panel's findings are supported by clear and convincing evidence. The Hearing Panel's findings deserve great deference "because the [Hearing Panel] is in a position to evaluate the testimony and evidence first-hand," and may observe the "demeanor and candor of the witnesses, including the judge." In re Ford-Kaus, 730 So.2d 269, 276 (Fla. 1999); In re LaMotte, 341 So.2d 513, 518 (Fla. 1977). However, the "ultimate power

and responsibility in making a determination rests with this Court." Ford-Kaus, 730 So.2d at 276. If the Hearing Panel's findings meet the clear and convincing standard of proof, this Court is to "give the findings persuasive force and great weight in considering the [Hearing Panel's] recommendation of discipline." In re Rodriguez, 829 So.2d 857, 860 (Fla. 2002).

I. Clear And Convincing Evidence Supports The Hearing Panel's Findings That Respondent Practiced Law While A Judge And Advised A Client To Flee The Jurisdiction To Avoid Criminal Prosecution.

The clear and convincing standard "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" Ford-Kaus, 730 So.2d at 276. The trier of fact under this standard should look at the "sum total of the evidence" in making a determination about the sufficiency of proof. In re Davey, 645 So.2d 398, 404 (Fla. 1994); see also Claims Management, Inc. v. Drewno, 727 So.2d 395, 400 (Fla. 1st DCA 1999) (finding the determination of clear and convincing evidence "may be made from the totality of all of the evidence.").

Respondent admitted practicing law while a judge in a knowing and direct violation of the Code of Judicial Conduct. (Hearing Panel Transcript ("T."), pp. 374-377). Further, three witnesses provided testimony that

together constituted clear and convincing evidence that Respondent advised Ms. Jimenez to flee. Accordingly, this Court should approve the Hearing Panel's findings of guilt as to Counts One and Two of the Formal Charges against Respondent.

A. Respondent Admitted Knowingly Violating the Code Of Judicial Conduct By Practicing Law While He Was A County Judge.

Respondent admitted he practiced law while a county judge, in direct violation of the Code of Judicial Conduct. Canon 5G, Code of Judicial Conduct, states in pertinent part: "A judge shall not practice law." This prohibition is of such importance that Article V, Section 13 of the Constitution of the State of Florida also states that a judge "shall not engage in the practice of law." Count One of the Notice of Formal Charges against Respondent charged Respondent with practicing law while a county judge. (Notice of Formal Charges, ¶¶ 1-4). Importantly, Respondent testified before the Hearing Panel that he consciously and deliberately violated Canon 5G of the Code of Judicial Conduct in order to receive a $15,000 retainer check for the representation of Ms. Jimenez:

> Q: For those reasons that you just told us is why you made a deliberate decision to violate the Code of Judicial Conduct?

A: Sir, I'm not denying I violated it. I agree, yes, sir.

Q: And the reason you did it was to get an income, to get the $15,000 retainer check?

A: Sir, I just explained that. Yes, sir, I just explained that.

Q: That's why you consciously decided to violate the Code of Judicial Conduct, for $15,000?

A: Yes, sir.

(T. 375).

The Hearing Panel found this testimony showed deliberate misconduct by Respondent. (Findings, p. 16) ("Despite his vacation status, Judge Henson recognized that he was still legally a Count Court judge and that he should not have engaged in the practice of law in any fashion.").

B. Clear and Convincing Evidence Supports The Hearing Panel's Findings That Respondent Advised Ms. Jimenez To Flee To Colombia to Avoid Criminal Prosecution.

The record supports the Hearing Panel's finding of clear and convincing evidence that Respondent advised Ms. Jimenez to flee. Respondent represented Ms. Jimenez beginning in December 2000 on DUI manslaughter and other related charges. (Stipulations, ¶4). Four witnesses testified about Respondent's advice that Ms. Jimenez should flee.

First, Dr. Alberto Jimenez testified in clear detail about a telephone call he received at his office from Respondent:

> A: [Respondent] said, "The only situation is that we can put" – he said, "We can put your daughter Diana on a plane to Puerto Rico and from Puerto Rico to Colombia."
>
> I said, "No, I don't accept that. Because I know that there is a treaty between Colombia and the United States, extradition."[1] …

[1] Respondent argues that Dr. Jimenez's testimony should be "accorded very little weight" because Dr. Jimenez contradicted his own testimony by testifying that he told Respondent that there was no extradition treaty between the United States and Colombia. (Respondent's Brief, p. 13). This argument is based on an incomplete reading of the record. Respondent relies on the following quote from the record in asserting that Dr. Jimenez contradicted himself:

> Q: Did you tell that to Mr. Henson? You told Mr. Henson that?
>
> A: Yeah, I tell him that. I know about that. I said, "No, there is no extradition." He said to me, he said, "Yes, there is extradition about that."
>
> I – "Even so, I don't like that option. Because I'm paying you to defend my daughter, and I want that you be ready for trial."
>
> (T. 279).

However, in the errata sheet to Dr. Jimenez's deposition, Dr. Jimenez identified an error in this portion of his deposition transcript, and corrected the error to indicate that he told Respondent that there was an extradition treaty with Colombia. The corrected transcript according to Dr. Jimenez's errata sheet is as follows:

(T. 279; emphasis added).

Second, Ms. Jimenez testified that although Respondent did not explicitly advise her to flee to Colombia, he regularly encouraged her to consider fleeing to Colombia after she had already explicitly said she would not do so. (T. 71). The Hearing Panel recognized that these suggestions started early in Respondent's representation of Ms. Jimenez. (Findings, p. 14) ("The subject of Jimenez possibly fleeing to Columbia [sic] was discussed on several occasions thereafter … Henson and Diana made a trip to the bar to look for witnesses in January of 2001, and Henson again asked her about whether she still had her Columbian [sic] passport … She told him she did."). Ms. Jimenez testified that in August 2001, Respondent advised her that she had "slim chances" of acquittal and that she could face 33 years imprisonment if she went to trial. (T. 43). Ms. Jimenez further testified that Respondent discussed plea bargain offers with her, and she

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> I said, "No. There is no extradition." He said to me – I said, "Yes, there is extradition about that."
>
> (Cite; emphasis added).

This corrected testimony, along with the unambiguous testimony from Dr. Jimenez that he told Respondent he did not accept the flight option because he knew there was an extradition treaty with Colombia, shows that Dr. Jimenez was consistent and precise in his testimony. (T. 279). Respondent's argument importantly ignores the substance of Dr. Jimenez's testimony.

emotionally reacted to the thought of long prison time she could receive. (T. 43-44). Ms. Jimenez testified that in response to her emotional reaction, Respondent began discussing Colombia:

> Like I told you prior in our interviews, I did not know who brought it up, but it came up about Colombia. And he asked me about my family – Mr. Henson asked me about my family in Colombia. I told him that I was not even thinking of anything of going to Colombia; and, besides, they would come and get me. That was my thing. I was not going to be looking over my shoulder every single time, waiting for somebody to come and pick me up … That's where he said that there was no extradition law from Colombia … But I told them I'm not worried about Colombia. Colombia to me was not an option.

(T. 44-45).

Ms. Jimenez testified that she understood from her conversation with Respondent that Respondent was suggesting she flee to Colombia:

> Q: Did you understand that fleeing to Colombia was one of your options?
>
> …
>
> A: Yes.
>
> Q: And did you understand that in connection with your conversation with Mr. Henson?
>
> …
>
> A: Yes.
>
> Q: Do you have a clear recollection of Mr. Henson making the statement at this meeting that there was no extradition treaty between the United States and Colombia?

A: Yes, sir, that's exactly what he had said.

…

Q: So the first person to speak the word "Colombia" at this meeting, was that Mr. Henson?

A: Yes …

(T. 46-47).

Respondent asserts that Ms. Jimenez "conceded" and "repeatedly indicated that Judge Henson never told her to flee the jurisdiction." (Respondent's Brief, pp. ix, 8). This is at least a gross overstatement if not a misleading characterization of the substance of Ms. Jimenez's testimony, in which Ms. Jimenez in great detail explained (in response to cross-examination by Respondent's counsel) how she came to understand that Respondent was advising her to flee the jurisdiction. (T. 73-77, attached at **Tab A**). The Hearing Panel from this testimony correctly concluded that "although Judge Henson did not specifically tell her to flee to Columbia [sic], that Judge Henson gave her to understand on more than one occasion that fleeing to Columbia was an option which she should consider. (T. 45, 45, 67, 70, 71, 76, 77)." (Findings, p. 19). Ms. Jimenez's testimony shows that Respondent, without explicitly stating that Ms. Jimenez should flee to Colombia, advised her to do so by telling her that she was facing 30 plus

years in prison, that there was no extradition treaty between Colombia and the United States, and that United States law enforcement officials would not search for her in Colombia because her criminal charges were not serious enough.[2]

Finally, Robert Nesmith, an attorney who shared office space with Respondent in 2001, testified that Respondent confessed to him the conversation advising flight that Respondent had with Dr. Jimenez. (T. 106, 112-113). Mr. Nesmith, at the request of Respondent, handled a bond hearing for Ms. Jimenez in December 2000 when Respondent was still a county judge, and was familiar with Ms. Jimenez's case because he interviewed Ms. Jimenez. (T. 107, 109, 143). Mr. Nesmith also testified that he and Respondent had a close personal relationship at the time Respondent was handling Ms. Jimenez's case. (T. 184). Mr. Nesmith testified:

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[2] Additionally, Maria Jimenez, Ms. Jimenez's mother, confirmed Ms. Jimenez's testimony regarding Respondent's mention of Colombia at the August 2001 meeting. Maria Jimenez understands only some words in English. (T. 84). Maria Jimenez testified that in August 2001 she attended the meeting with Ms. Jimenez and Respondent at Respondent's office. (T. 84-85). Maria Jimenez testified that at this meeting she heard Respondent state the word "Colombia" and also heard the word "extradition." (T. 85-88). Maria Jimenez's testimony conflicted with Respondent's testimony that he did not recall a discussion about Colombia at this meeting. (T. 392). Accordingly, the Hearing Panel concluded Respondent had been "untruthful in his testimony before the Hearing Panel." (Findings, p. 11).

Q: As best you're able to recall, please, sir, tell us what Mr. Henson said to you in this conversation.

A: Well, I had been sitting – I was in my office, which was the front office. Mr. Henson came to the office and asked me to come down to his office, he had something to tell me. Upon arriving at his office and sitting down, he said, "If you ever say anything about this, I would deny it, I would refuse knowledge of it." And he said that he had told Diana and her dad that she should leave and go to Colombia.

(T. 112-113).

Respondent unconvincingly asserts that Mr. Nesmith's testimony provides "little support" for the Hearing Panel's finding of guilt because Mr. Nesmith was unclear as to when this conversation took place. (Respondent's Brief, p. 10). However, Mr. Nesmith explained that although he did not know exactly <u>when</u> Respondent told him about his conversation with Dr. Jimenez, as Mr. Nesmith's conversation took place more than three years before his testimony before the Hearing Panel, he was clear about <u>what</u> Respondent said. (T. 198). Mr. Nesmith stated that the conversation he had with Respondent about Respondent's advice to Dr. Jimenez was "as vivid as if it happened just five minutes ago." (T. 168).

Based on the totality of evidence, which must be considered in applying the clear and convincing standard, this Court should affirm the finding of guilt reached by the Hearing Panel as to the charge that

Respondent advised Ms. Jimenez to flee. In evaluating the Hearing Panel's findings, this Court should consider that the Hearing Panel was not a passive audience, as "members of the Hearing Panel themselves also closely questioned most of the live witnesses." (Findings, p. 11). The Hearing Panel was particularly vigorous in its examination of witnesses called by Special Counsel. (T. 149-189; 513-524).

Three witnesses, a doctor, teacher, and lawyer, testified that Respondent advised Ms. Jimenez to flee. Dr. Jimenez's testimony about Respondent's advice to him was clear. Ms. Jimenez's testimony about the implications of Respondent's conversations with her about Colombia was unambiguous. Robert Nesmith had a vivid recollection of his conversation with Respondent regarding Respondent's conversation with Dr. Jimenez about Ms. Jimenez fleeing to Colombia. The Hearing Panel had a clear understanding of the conflict between the testimony of these witnesses and Respondent, who was the only fact witness offered in his defense, and who "testified that although the subject of Columbia [sic] came up, he never advised or counseled Jimenez to flee." (Findings, p. 18). The Hearing Panel, "charged with the responsibility of resolving the conflicts in evidence," rejected Respondent's testimony and accepted the testimony of Ms. Jimenez, Dr. Jimenez, and Robert Nesmith. (Findings, p. 19.)

This Court should not accept Respondent's argument treating each witness's testimony in a vacuum, as this Court is to examine the "sum total of the evidence" in reaching its findings. Davey, 645 So.2d at 404. An appropriate analysis of the aggregate evidence shows the lack of merit in Respondent's attempts to twist the record by focusing on perceived deficiencies in each witness's isolated testimony.[3]

Although Respondent asserts that Dr. Jimenez and Robert Nesmith are not credible witnesses, Respondent confirmed that the conversations about which these two witnesses testified actually occurred. However, Respondent provided a different version of these conversations. According to Respondent, when Respondent told Dr. Jimenez that a plea offer for Ms. Jimenez had been revoked, it was Dr. Jimenez who stated that Ms. Jimenez might as well flee to Colombia. (T. 352-353). Therefore, it is clear from the record that Dr. Jimenez and Respondent at one time had a conversation about Ms. Jimenez fleeing to Colombia. The Hearing Panel, which was in a position to observe first-hand the demeanor of the witnesses, found Dr. Jimenez's account of the conversation to be more credible than Respondent's account. (Findings, p. 19). This Court should give deference to that finding. See LaMotte, 341 So.2d at 518.

[3] Respondent's claim that the record does not support the charges against him is not adequately supported by citations to the record.

Respondent also acknowledged his conversation with Robert Nesmith about Ms. Jimenez fleeing to Colombia. (T. 395). According to Respondent, he called Mr. Nesmith into his office and recounted a conversation with Dr. Jimenez in which Respondent asserts Dr. Jimenez said Ms. Jimenez should flee to Colombia. (T. 395-396). Respondent now argues that Mr. Nesmith is not a credible witness simply because Mr. Nesmith could not recall the exact date of this conversation with Respondent that took place more than three years before Mr. Nesmith's testimony before the Hearing Panel. (Respondent's Brief, p. 10). This argument avoids recognizing what is clear from the record: Mr. Nesmith and Respondent did have a conversation about Ms. Jimenez fleeing to Colombia. As with Respondent's conversation with Dr. Jimenez, Respondent and Mr. Nesmith conflict about their conversation. The Hearing Panel, which observed both witnesses first-hand, accepted Mr. Nesmith's testimony and rejected Respondent's testimony. (Findings, p. 19).

Respondent testified that he did not recall a conversation with Ms. Jimenez about Colombia in the meeting at his office in August 2001 (T. 392). Respondent's testimony about this meeting also conflicts with Ms. Jimenez's testimony and with Maria Jimenez's testimony, in which Maria Jimenez stated that at this meeting she heard Respondent say the word

"Colombia" and also heard the word "extradition." Faced with conflicting evidence about this meeting, the Hearing Panel believed the Jimenezes' account of this meeting. (T. 85-88).

This Court should review the evidence regarding Respondent's advice to Ms. Jimenez to flee to Colombia and should affirm the Hearing Panel's findings that clear and convincing evidence supports the allegation that Respondent advised Ms. Jimenez to flee.[4] Although the testimony of any one witness in this proceeding alone may arguably not qualify as clear and convincing evidence, the totality of three witnesses' testimony and Respondent's confirmation of the details mentioned in some of these witnesses' testimony is clear and convincing evidence of Respondent's misconduct. Moreover, Respondent's admission that he knowingly violated the Code of Judicial Conduct for monetary gain is further evidence of and gives credibility to the charge that Respondent advised a client to flee in a

[4] It is apparent that the Hearing Panel applied a clear and convincing evidentiary standard in reaching its findings, as it did not accept claims against Respondent that did not meet this standard. Although the Hearing Panel found that Respondent advised Ms. Jimenez to flee to Colombia, it found that there was not clear and convincing evidence that Respondent advised Jerry Lee Thompson and Hector Rodriguez, Jr. to flee the jurisdiction to avoid criminal prosecution. (Findings, pp. 24-25). Moreover, the Hearing Panel rejected the charge against Respondent that he failed to communicate a plea offer to Ms. Jimenez because of the "absence of clear evidence." (Findings, pp. 20-21). These findings show the Hearing Panel carefully scrutinized the evidence against Respondent, reviewed the evidence in an analytical manner, and applied the correct standard.

criminal case for which the Hearing Panel found Respondent was not adequately prepared. (Findings, p. 18).

The Hearing Panel, which was in a position to evaluate this testimony first-hand, rather than having to review a record without live testimony, reached a finding of guilt based on the totality of the evidence, and this finding should be given deference by this Court.

II. The Hearing Panel Did Not Improperly Consider Acquitted Misconduct, Uncharged Misconduct, Or Inadmissible Hearsay In Reaching Its Findings Or Recommended Discipline.

The record shows the Hearing Panel admitted and considered only proper evidence in reaching its findings. Respondent was charged with failing to communicate a plea offer to Ms. Jimenez. (Notice of Formal Charges, ¶ 8). The Hearing Panel found Respondent not guilty of this charge. (Findings, p. 5). Nevertheless, without a citation to the record, Respondent asserts that "it is readily apparent that the Hearing Panel used evidence on this charge [of failing to communicate a plea offer] to support both its finding of guilt on Count Two and its recommendation that Judge Henson be removed from office." (Respondent's Brief, p. 19). Respondent's assertion is without merit, as the only other mention of this alleged misconduct in the Hearing Panel's findings relates to the Hearing

Panel's determination that there was an "absence of clear evidence" to support this charge. (Findings, pp. 20-21). There is simply no other mention in the findings of the Hearing Panel's consideration of this alleged misconduct. Accordingly, the record does not support Respondent's assertion that his alleged failure to communicate a plea offer was improperly considered by the Hearing Panel.

Respondent also asserts that the Hearing Panel, in finding Respondent guilty of advising Ms. Jimenez to flee, improperly considered evidence related to the allegations that Respondent advised Jerry Lee Thompson and Hector Rodriguez, Jr. to flee the jurisdiction to avoid criminal prosecution. (Respondent's Brief, p. 19). The Hearing Panel concluded there was "insufficient clear and convincing evidence concerning the assertions that Judge Henson also counseled defendant Thompson and defendant Rodriguez to flee the country to avoid prosecution." (Findings, p. 24). This is the only evidence of the Hearing Panel's consideration of these charges.

Additionally, Respondent asserts that the Hearing Panel improperly considered its finding that Respondent was untruthful as an additional basis for recommending Respondent's removal. (Respondent's Brief, pp. 20-21). Respondent's argument requires this Court to believe that the Hearing Panel

deliberately misrepresented its weighing of the evidence, as the Hearing Panel unambiguously stated:

> The Panel concludes that Judge Henson has been untruthful in his testimony before the Hearing Panel. However, in accordance with In re: Davey, at p.405-407, the lack of candor before this Hearing Panel is not considered as a separate charge and the findings and recommendations herein are based solely on the conduct charged in the Notice of Formal Charges.
>
> (Finding, pp. 11-12; emphasis added).

The Hearing Panel's statement as to Respondent's untruthfulness was a statement of the obvious: The Hearing Panel necessarily found Respondent to be untruthful because it found the conflicting testimony of Ms. Jimenez, Dr. Jimenez, Maria Jimenez, and Robert Nesmith to be truthful.

Respondent further asserts that it was improper for the Hearing Panel in its findings to make a statement regarding Respondent's preparedness for Ms. Jimenez's trial, as Respondent was no longer charged with inadequate representation of Ms. Jimenez. (Respondent's Brief, p. 21). However, it is also clear that the Hearing Panel did not consider Respondent's lack of preparedness to be an independent charge against Respondent, but considered it merely as a motive for Respondent to advise Ms. Jimenez to flee to Colombia:

> Diana Jimenez and her father did not believe Judge Henson was ready to defend her in a trial and she thus believed that he was

> actually counseling and advising her to flee and avoid prosecution and thereby avoid a trial.
> …
>
> Thus the Panel concludes that Judge Henson was not ready to proceed with a trial and this was a factor which motivated him to suggest to his client that the option of flight was available. He further advised the client that she would not be extradited from Colombia.

(Findings, pp. 20, 26-27).

Respondent also argues that the Hearing Panel improperly received testimony from Robert Nesmith that Respondent offered "to buy [Mr. Nesmith's] silence" by referring a criminal case to Mr. Nesmith, as this related to uncharged misconduct. (Respondent's Brief, p. 10). Special Counsel for the Judicial Qualifications Commission stated to the Hearing Panel in closing argument that this evidence was not presented as evidence of additional misconduct by Respondent, but was presented to show that Respondent and Mr. Nesmith had a confidential relationship in which it would not be unusual for Respondent and Mr. Nesmith to discuss Respondent's conversation with Dr. Jimenez about Ms. Jimenez fleeing. (T. 539-540). The record is clear that the Hearing Panel did not rely on this testimony in making its recommendation: "The testimony concerning buying Nesmith's silence was not specifically related to the mention of fleeing and the Panel does not rely upon this particular statement which

Nesmith attributed to Judge Henson." (Findings, p. 23; emphasis added). Accordingly, the Hearing Panel did not consider uncharged misconduct in making its findings and recommendations.

Respondent further asserts that the Chair of the Hearing Panel improperly allowed into evidence the portion of Maria Jimenez's deposition transcript in which Maria Jimenez stated that she heard Respondent state the word "Colombia" and heard the word "extradition" at a meeting with Respondent and Ms. Jimenez. (Respondent's Brief, p. 22). Respondent asserts that this testimony was hearsay. Id. Pursuant to Section 90.803(18)(a), Florida Statutes, a statement is not inadmissible as evidence if the statement is one "offered against a party" and is the party's "own statement in either an individual or a representative capacity." This evidentiary rule allowed admission of Maria Jimenez's testimony regarding Respondent's statements.

Finally, Respondent argues that the Chair of the Hearing Panel erred in admitting the deposition testimony of Jerry Lee Thompson. Rule 1.330(a)(3)(D), Florida Rules of Civil Procedure, which pursuant to Rule 12(a), Florida Judicial Qualifications Commission Rules, was applicable to the proceeding before the Hearing Panel, states:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds … that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

The Chair of the Hearing Panel found Special Counsel for the Judicial Qualifications Commission had Jerry Lee Thompson properly served with a subpoena for trial in accordance with Section 48.031, Florida Statutes. (T. 90; Exhibit 19). Jerry Lee Thompson did not appear before the Hearing Panel. (T. 89). Therefore, in accordance with Rule 1.330, Florida Rules of Civil Procedure, the Chair of the Hearing Panel correctly allowed Mr. Thompson's deposition to be read to the Hearing Panel "as though [Mr. Thompson] were then present and testifying." See Castaneda v. Redlands Christian Migrant Association, Inc., 884 So.2d 1087, 1093 (Fla. 4th DCA 2004) ("Florida does not allow such discretion on the part of the trial courts to ignore the Rules of Evidence or the Rules of Civil Procedure.").

Respondent's assertion that he was denied due process by the Hearing Panel is without merit. (Respondent's Brief, pp. 17-19). Although proceedings before the JQC must meet "minimum standards of due process," they are "not criminal proceedings" because the most severe discipline that may be imposed is removal from judicial office, not imprisonment. In re J.Q.C. No. 77-16, 357 So.2d 172, 180 (Fla. 1978). Procedural due process

"requires that a judge be given notice of proceedings against him or her, that a judge be given an opportunity to be heard, and that the proceedings against the judge be essentially fair." In re Shenberg, 632 So.2d 42, 45 (Fla. 1992). The record is clear that Respondent was afforded due process because he was given notice of the Hearing Panel's proceeding, an opportunity to be heard at this proceeding, and the proceeding was essentially fair.

III. The Hearing Panel Considered All Of The Evidence In Recommending Removal Of Respondent.

Respondent asserts that the Hearing Panel failed to consider evidence of Respondent's good character in recommending that Respondent be removed from office. This assertion is contradicted by the Hearing Panel's findings. In describing the evidence received by the Hearing Panel, the Hearing Panel specifically stated that it heard the testimony of three character witnesses for Respondent and received six letters attesting to Respondent's good character. (Findings, p. 10). The Hearing Panel also stated that in making its recommendation for the removal of Respondent, it gave "full consideration" to "all of the evidence." (Findings, p. 25).

Notwithstanding the evidence presented by Respondent of his good character, the Hearing Panel concluded that the violations committed by

Respondent would "impair the confidence of the citizens of this state in the integrity of the judicial system and that these violations constitute conduct unbecoming a member of the judiciary," making Respondent "unfit to hold judicial office." (Findings, pp. 11, 26). Accordingly, it is clear the Hearing Panel fully considered all of the evidence and appropriately followed the removal standard imposed by Article V, Section 12(a) of the Constitution of the State of Florida. Respondent cites no record evidence to the contrary.

IV. The Judicial Qualifications Commission Has Jurisdiction To Remove Respondent From His Present Judicial Office For Respondent's Misconduct While A County Judge.

The JQC has jurisdiction to remove Respondent from his current judicial office for misconduct committed by Respondent when he was earlier a county judge. Article V, Section 12(a) of the Constitution of the State of Florida states in pertinent part:

> There shall be a judicial qualifications commission vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966, (without regard to the effective date of this section) demonstrates a present unfitness to hold office …
>
> The commission shall have jurisdiction over justices and judges regarding allegations that misconduct occurred before or during

> service as a justice or judge if a complaint is made no later than one year following service as a justice or judge.
>
> (emphasis added).

Respondent asserts that because Count One of the Formal Charges against him is based on misconduct that occurred while he was a county judge in December 2000, and because the formal charges based on this conduct were filed more than one year after his county judicial office expired in January 2001, then the JQC does not have jurisdiction over these charges.[5]

In In re Davey, 645 So.2d 398 (Fla. 1994), a judge was charged for misconduct occurring when he was a lawyer and before he became a judge. Judge Davey argued that Article V, Section 12 of the Constitution of the State of Florida, which was amended in 1974 to allow the JQC to investigate conduct occurring "during term of office or otherwise occurring on or after November 1, 1966," granted the JQC jurisdiction over his pre-judicial conduct only if that conduct occurred in a prior judicial office. Id. at 403. This Court explicitly disagreed with Judge Davey's argument, and held the JQC has jurisdiction over not only conduct committed by a judge in an

[5] Respondent unsuccessfully raised this argument to the Hearing Panel. (Findings, p. 8).

earlier judicial office, but also over conduct committed by a judge outside of judicial office:

> The language of section 12 is unambiguous on its face and we conclude that it means just what it says: The Commission may investigate and recommend the removal or reprimand of any judge whose conduct in or outside of office warrants such action.
>
> In re Davey, 645 So.2d 398, 403 (Fla. 1994) (emphasis added).

See also In re Kelly, 238 So.2d 565, 570 (Fla. 1970) (finding the JQC may consider "any acts of misconduct which reflect adversely upon the general character and fitness necessary to the proper performance of the duties of judicial office.").

Respondent is currently a circuit judge. (Findings, p. 6). Accordingly, the Judicial Qualifications Commission has jurisdiction over Respondent's conduct occurring on or after November 1, 1966, if the formal charges are filed against Respondent before one year following Respondent's service as a circuit judge. The formal charges against Respondent were filed in January 2004, during Respondent's current service as a circuit judge. Accordingly, the JQC, in this notice of formal charges, had jurisdiction over and could have charged Respondent with any misconduct committed in or out of office by Respondent on or after

November 1, 1966, including Respondent's misconduct while a county judge. See In re Hapner, 718 So.2d 785, 787 (Fla. 1998) (finding the one-year period following a judge's office in which the JQC may investigate a judge "vests," rather than limits, the JQC's jurisdiction). By taking judicial office for a second time, Respondent renewed the JQC's jurisdiction over any post-1966 misconduct. This interpretation of the Constitution's clear language is necessary to implement the JQC's role as the body that preserves confidence in the judiciary. If Respondent's interpretation of the JQC's jurisdiction had merit, the JQC would not have jurisdiction over misconduct committed by Respondent while a county judge or while he was a lawyer before becoming a county judge, and the JQC would be materially less effective in maintaining public confidence in the judiciary.

V. Removal Is The Appropriate Discipline Because Respondent's Misconduct Demonstrates A Present Unfitness To Hold Judicial Office.

The Hearing Panel recommended removal because Respondent's conduct while a county judge and while an attorney is fundamentally inconsistent with his responsibilities of judicial office. Because the Hearing Panel's findings meet the clear and convincing standard of proof, the findings are of "persuasive force" to this Court and are given "great weight"

in considering the Hearing Panel's recommendation of discipline. In re Rodriguez, 829 So.2d 857, 860 (Fla. 2002).

Pursuant to the Constitution of the State of Florida, the Hearing Panel may recommend the removal of a judge whose conduct "demonstrates a present unfitness to hold judicial office." Article V, Section 12(a), Constitution of the State of Florida. This Court stated:

> Removal is the ultimate sanction in judicial disciplinary proceedings. We approve recommendations from the JQC that a judicial officer be removed when we conclude that the judge's conduct is fundamentally inconsistent with responsibilities of judicial office.
>
> In re Graziano, 696 So.2d 744, 753 (Fla. 1997).

A judgeship is a "position of trust." In re McAllister, 646 So.2d 173, 178 (Fla. 1994). Accordingly, "[t]he judicial system can only function if the public is able to place its trust in judicial officers." In re Ford-Kaus, 730 So.2d 269, 277 (Fla. 1999). This Court has found removal to be the appropriate sanction when a judge's conduct "diminishes the public's confidence in the integrity of the judicial system." Id.

The Hearing Panel found that "[a]n incumbent judge who begins practicing law too early is not a matter that can be passed over as unimportant." (Findings, p. 17). The Hearing Panel realized the importance

of Respondent admitting to knowingly violating the Code of Judicial Conduct for $15,000. (Findings, p. 17; T. 375).

Advising a client to flee the jurisdiction to avoid criminal prosecution is an "extremely serious matter" because such conduct is in direct violation of Florida criminal law. See Fla. Stat. § 843.15; Findings, pp. 24-26. The Hearing Panel concluded that despite recognizing that it is inappropriate to counsel a client to flee the jurisdiction, Respondent nevertheless made such recommendations. (Findings, p. 26; T. 456).

Based on its findings, the Hearing Panel concluded that Respondent's "violations will impair the confidence of the citizens of this state in the integrity of the judicial system." (Findings, p. 26). Accordingly, the Hearing Panel found Respondent is presently unfit to hold judicial office because his actions were "inconsistent with the responsibilities of a judicial officer," and recommended his removal. (Findings, p. 11).

In light of this Court's prior decisions in which removal of judge was approved, and given the seriousness of Respondent's misconduct, removal of Respondent from judicial office is the appropriate discipline and is necessary to maintain the public's confidence in the integrity of judicial officers. This Court has approved the removal of a judge from office in a number of cases involving less serious misconduct by a judge. For example,

in In re Ford-Kaus, 730 So.2d 269, 272 (Fla. 1999), this Court approved the Hearing Panel's recommendation of removal of a judge who while a lawyer mishandled the filing of an appellate brief and overbilled her client for it. In In re Graziano, 696 So.2d 744, 747-748 (Fla. 1997), this Court approved the Hearing Panel's recommendation of removal of a judge who improperly influenced the decision to hire her friend as a guardian ad litem, awarded her friend a pay raise despite her friend's unsatisfactory job performance, and spoke insultingly to court employees. Additionally, in In re Garrett, 613 So.2d 463 (Fla. 1993), this Court approved the removal of a judge who shoplifted an item from an electronics store. Furthermore, in In re LaMotte, 341 So.2d 513 (Fla. 1977), this Court approved the removal of a judge who used a government credit card to pay for personal travel expenses. Finally, in In re Johnson, 692 So.2d 168 (Fla. 1997), this Court removed a judge for backdating plea agreements and conviction dates and for ordering an inordinate number of continuances in order to minimize the number of cases reported as being on her docket. This Court approved the removal of Judge Johnson despite her "otherwise unblemished judicial record" because her acts "strike at the very heart of judicial integrity." Id. at 172-173. This Court found that "[t]here can be no question that Judge Johnson knew what she was doing." Id. at 173.

Here, Respondent's violations strike at the heart of judicial integrity because they transgressed the Code of Judicial Conduct, Rules of Professional Conduct, and criminal law, and were committed by Respondent in conscious violation of such provisions.

The Hearing Panel, following this Court's requirement that the totality of conduct be evaluated, appropriately concluded that although Respondent's practice of law while a judge "alone might well have warranted only a reprimand," this conduct combined with Respondent's advice to Ms. Jimenez warrants Respondent's removal. See In re McMillan, 797 So.2d 560, 573 (Fla. 2001) ("Even if a single impropriety were considered insufficient in isolation, the cumulative weight of the improprieties supports removal."); In re Crowell, 379 So.2d 107, 110 (Fla. 1979) (reviewing acts of misconduct "as a whole" in approving removal of judge); In re Graham, 620 So.2d 1273, 1276 (Fla. 1993) (reviewing "cumulative conduct" of judge and the "totality of circumstances" in approving removal of judge). The public simply cannot have confidence in a judge who consciously violated the Code of Judicial Conduct in order to obtain a retainer fee, and then counseled the same client from whom the fee was obtained to flee to Colombia to avoid criminal prosecution. As Dr. Jimenez insightfully observed, a judge cannot "serve the people when he

isn't able to serve the truth." (T. 312). Respondent's proven misconduct is fundamentally inconsistent with the responsibilities of a judicial officer, and erodes the trust the public must have in a judicial officer to maintain the integrity of the judicial system. Accordingly, this Court should find Respondent is presently unfit to hold judicial office and should order the removal of Respondent from judicial office.

Conclusion

Respondent knowingly violated the Code of Judicial Conduct for money, and three witnesses provided testimony that Respondent advised Ms. Jimenez to flee to Colombia. This Court should give great weight to the Hearing Panel's recommendation of removal, find that Respondent is presently unfit to hold judicial office, order his removal, and assess Respondent with the costs of these proceedings in accordance with Rule 2.140, Florida Rules of Judicial Administration.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Kirk N. Kirkconnell, Esq., Kirkconnell, Lindsey, Snure & Yates, P.A., 1150 Louisiana Avenue, P.O. Box 2728, Winter Park, Florida 32790, on this ___ day of April, 2005.

_____
Attorney

Certificate of Font Requirements

The undersigned hereby certifies compliance with the font requirements of Rule 9.210(a), Fla. R. App. P.

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